2-16-2012

Boise Mode, LLC v. Donahoe Pace & Partners Appellant's Brief Dckt. 39229

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT NO. 39229-2011

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff-Respondent,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants-Appellants.

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
for the County of Ada
Case No. CV 2009-11334

Honorable Ronald J. Wilper, District Judge

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case arises out of a commercial lease dispute. The appeal raises questions concerning the District Court's ruling denying Donahoe Pace & Partners Ltd and Timothy Pace's (collectively "DPP") Motion for 56(f) Continuance, as well as its decision to consider Boise Mode, LLC's ("Boise Mode") motion for reconsideration of a motion to amend or alter a judgment. In addition, the appeal calls into question the District Court's decision granting summary judgment in favor of Boise Mode.

B. COURSE OF THE PROCEEDINGS BELOW

This lawsuit commenced on January 20, 2010, when Boise Mode filed its Verified Complaint, alleging damages arising out of a breach of commercial lease. R., at 7-13. DPP filed its Answer and Counterclaim on or about February 11, 2010. R., at 80. In the Answer and Counterclaim, the Defendants/Counter-Claimant alleged a variety of affirmative defenses and counter-claims. R., at 80-91. On April 8, 2010, Defendants/Counter-Claimant served their First Set of Interrogatories, Requests for Production of Documents and First Set of Requests for Admissions on Plaintiff/Counter-Defendant. R., at 114-115. Boise Mode served Answers and Responses to DPP's discovery on May 10, 2010. R., at 118-119. It served DPP with its First Set of Interrogatories, Requests for Production of Documents and Requests for Admission on June 24, 2010, approximately five months after commencing the lawsuit. R., at 127-129. DPP served its

Responses to Boise Mode's Requests for Admission on July 23, 2010, and its Answers and Responses to the Interrogatories on August 5, 2010. R., at 130-131; 156-136. DPP served subpoenas duces tecum on The North Face and Colliers Idaho Property Management, LLC on November 15, 2010. R., at 354-360; 357-358. The North Face did not attend the scheduled December 1, 2010 deposition;[1] Colliers Idaho Property Management, LLC contacted DPP's counsel and reported that it previously had turned over the requested files to Boise Mode. R., at 365-366.

On Wednesday, November 24, 2010, at approximately 5:00 p.m., the Plaintiff/Counter-Defendant served the following documents on the Defendants/Counter-Claimant: (1) Motion for Summary Judgment on the Verified Complaint; (2) Motion for Summary Judgment on Counter-Claimant's Counterclaims; (3) Memorandum in Support of Plaintiff's Motion for Summary Judgment on the Verified Complaint; (4) Memorandum in Support of Motion for Summary Judgment on Defendant's Counterclaims; (5) Affidavit of Steven F. Schosssberg, Esq. (sic) In Support of Plaintiff's Motion for Summary Judgment; (6) Affidavit of David L. Baum In Support of Plaintiff's Motion for Summary Judgment; (7) Affidavit of Angela Aeschliman, CPM, CCIM In Support of Plaintiff's Motion for Summary Judgment; and (8) Affidavit of Christopher Kiefor, CPA, In Support of Plaintiff's Motion for Summary Judgment. R., at 366. Plaintiff/Counter-Defendant set its motions for summary judgment for hearing on December 22, 2010, at 3:00 p.m. R., at 440-

[1] The North Face objected to service on December 7, 2010, which was six days after the December 1, 2010 deposition date, and one day before DPP's Opposition to Boise Mode's Motion for Summary Judgment was due.

441.

DPP filed a Motion for 56(f) Continuance and 56(f) Affidavit of Counsel in Support of Motion for Continuance on December 8, 2010. R., at 361-419. The District Court heard oral argument on the Motion for Continuance on December 22, 2010, and denied it. R., at 451-452. On the same day, it heard oral argument on Boise Mode's Motion for Summary Judgment, and, granted it on December 27, 2010. R., at 451-460. The first final judgment was entered (the "Judgment") on January 5, 2011, R., at 461-462.

DPP filed a Motion to Amend Judgment Pursuant to I.R.C.P. 59(e) ("Motion to Amend") on January 19, 2011. R., at 481-491. The District Court heard oral argument on the Motion to Amend on February 28, 2011. R., at 517. In an order dated March 2, 2011, the District Court reversed summary judgment on the following causes of action of Boise Mode: (1) Breach of Contract; (2) Breach of Covenant of Good Faith and Fair Dealing; Breach of Personal Guaranty of Lease. The District let stand summary judgment on Boise Mode's Tortious Interference and Negligent Supervision claims, but reinstated DPP's Constructive Eviction, Breach of Contract and Breach of Covenant of Good Faith and Fair Dealing causes of action. R., at 517-525. The District Court also voided the January 5, 2011, Judgment. R., at 524.

On April 13, 2011, DPP filed a Motion to Compel Boise Mode to provide full, complete, accurate and non-evasive Answers and Responses to Interrogatories No. 18 and 19, as well as Request for Production No. 3. R., at 526-527. DPP has served another subpoena duces tecum on

The North Face on or about April 28, 2011. (Transcript) Boise Mode, in turn, opposed the Motion to Compel, but filed supplemental answers and responses to the discovery at issue. R., at 606; 603; 621. It also filed a Motion for Reconsideration and Further Reconsideration, requesting that the Court reverse its order granting DPP's Motion to Amend, grant summary judgment on its causes of action and on DPP's counterclaims. DPP opposed the Motion for Reconsideration. R., at 581. The District Court heard oral argument on May 23, 2011, and granted the Motion for Reconsideration and Further Reconsideration. R., at 642-648. As a result, the District Court ruled DPP's Motion to Compel moot. R., at 642-48. This appeal followed after entry of a second final Judgment on August 26, 2011. R., at 686-687, 689.

C. STATEMENT OF FACTS

Boise Mode and DPP entered into a commercial lease agreement ("Lease") on November 3, 2006 for space in a building Boise Mode owned, and which is located at 800 W. Idaho Street, Boise, Idaho. R., at 8-9. Timothy Pace, one of DPP's owners, signed a personal guaranty. R., at 8-9.

As early as August 2008, DPP informed Boise Mode that it was breaching the Lease. R., at 276-278, 303, 306, 307, 321, 324, 326, 327, 328. For example, in a letter from Timothy Pace to Boise Mode representative Angela Aeschliman dated December 17, 2009, DPP reports that it had formally advised Boise Mode's property manager on August 15, 2008 "as to specific problems resulting from construction activities that make this situation untenable and inhibit" its "ability to

conduct business as a professional services office . . . ." R., at 303.[2] Mr. Pace reiterated the proposition to Ms Aeschliman in a March 6, 2009, letter. R., at 306. As with the December 17, 2009 letter, the March 6, 2009 letter identified a litany of problems that DPP was having with the building, including debilitating noise and disruptions during business hours that required DPP employees to work outside the office, dangerous tools and materials left in hallways, an improperly installed ceiling fan that allowed water to leak into the premises, and an instance where a construction crew without authorization took over DPP's reception area. R., at 306. Another letter from Mr. Pace to Ms. Aeschliman, dated May 20, 2009, adds disruptions in utility and elevator services to the already lengthy list. R., at 307.

Boise Mode acknowledged that there were problems. For example, in a May 13, 2009, letter from Ms. Aeschliman to Timothy Pace, Boise Mode acknowledged that it was aware that "construction of the building had caused inconveniences." R., at 294. Likewise, Ms. Aeschliman acknowledged "there had been noise and disturbance" as a result of the construction. R., at 300. In addition to other problems that DPP had at the premises, the same letter discusses issues related to "noise, the elevator, the hallways, and etcetera." R., at 300, 295.

In response to the myriad of problems it encountered at the building and leased space, DPP stopped making rent payments in or about December 2008. R., at 453. The parties tried unsuccessfully to resolve the dispute, but by October 5, 2009, Boise Mode demanded payment of

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[2] Ms. Aeschliman states in her affidavit at paragraph 8 that she believes Mr. Pace's letter should read "December 17, 2008."

back rent, or failing that, DPP had to vacate the premises. R., at 453. DPP vacated the premises in November 2009. R., at 453. This lawsuit followed.

D. STANDARD OF REVIEW

1. Motion for Continuance

The decision whether to grant a motion for continuance is within the discretion of the court. *See, e.g., Reynolds v. Corbus*, 7 Idaho 481, 63 P. 884 (1901); *Corey v. Blackwell Lumber Co.*, 27 Idaho 460, 149 P. 510 (1915).

2. Interpretation of Idaho Rules of Civil Procedure

The Idaho Supreme Court exercises free review over the interpretation of the Idaho Rules of Civil Procedure. *See Canyon County Bd. Of Equalization v. Amalgamated Sugar Co.*, 143 Idaho 58, 60, 137 P.3d 445, 447 (2006).

3. Summary Judgment

On appeal from the grant of summary judgment, the reviewing court applies the same standard as that which was applied by the District Court in granting summary judgment. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008).

Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c); *Loomis v. City of Hailey*, 119 Idaho 434, 436, 807 P.2d 1272, 1274 (1991). In cases such as this, where a jury trial has

been requested, "the non-moving party is entitled to the benefit of all reasonable inferences to be drawn from the evidentiary facts." *Doe v. Sisters of the Holy Cross*, 126 Idaho 1036, 895 P.2d 1229 (Ct. App. 1995); *see also Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991)(summary judgment standard requires District Court and Supreme Court on review to liberally construe facts in existing record in favor of nonmoving party).

II.

APPELLANTS' STATEMENT OF THE ISSUES

1. Did the District Court err when it denied Defendants/Counter-Claimant Donahoe Pace & Partners LTD and Timothy Pace's Motion for Continuance Pursuant to I.R.C.P. 56(f)?

2. Did the District Court err in considering and ruling on Plaintiff/Counter-Defendant's Plaintiff's Motion for Reconsideration and Further Consideration?

3. Did the District Court err in granting summary judgment in favor of Plaintiff/Counter-Defendant Boise Mode, LLC on all of Defendants/Counter-Claimant Donahoe Pace & Partners LTD and Timothy Pace's claims in its Counter-Complaint?

4. Did the District Court err in granting summary judgment in favor of Plaintiff/Counter-Defendant Boise Mode, LLC on all claims in its Verified Complaint?

III.

ARGUMENT

By denying DPP's Motion for 56(f) Continuance, the District Court prevented DPP from being able to conduct full and fair discovery. In so doing, the District Court abused its discretion, and, as a result, the Judgment against DPP should be reversed. The District Court also committed reversible error when it entertained Boise Mode's Motion for Reconsideration and

Further Consideration, as that motion requested reconsideration of an order entered on a motion filed under I.R.C.P. 59(e). Furthermore, the District Court committed reversible error by granting summary judgment to Boise Mode on its causes of action and on DPP's counterclaims because the record unequivocally evidenced the existence of questions of material fact on the issues of breach and constructive eviction.

A. The District Court Abused Its Discretion When It Denied DPP's Motion for Continuance Pursuant to I.R.C.P. 56(f).

I.R.C.P. 56(f) permits a court to order a continuance of summary judgment proceedings "should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition . . . ." Although a discretionary matter, see, for example, *Corey v. Blackwell Lumber Co.*, 27 Idaho 460, 149 P. 510 (1915), courts "usually grant properly filed Rule 56(f) motions as a matter of course." *Doe v. Abington Friends School*, 480 F.3D 252, 257 (3d Cir. 2007).[3] This is especially true in cases where "there are discovery requests outstanding or relevant facts are under the control of the moving party." *See id.*; *see also Ward v. United States*, 471 F.2d 667, 670 (3d Cir. 1977); *Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 196-97 (4th Cir. 2006)(holding District Court abused discretion in denying motion for 56(f) continuance in part because denial "particularly inappropriate when, as here, 'the

[3] "Federal case law provides persuasive authority when interpreting rules under the I.R.C.P. that are substantially similar to rules under the F.R.C.P." *Terra West, Inc. v. Idaho Mutual Trust, LLC*, 150 Idaho 393, 247 P.3d 620 (2011); *see also Chacon v. Sperry Corp.*, 111 Idaho 270, 275, 723 P.2d 814, 819 (1986)(noting that whenever possible, the Court should "interpret[] our rules of civil procedure in conformance with the interpretation place upon the same rules by the federal courts.")

materials sought are the object of outstanding discovery" and when the information sought is "possessed only by her opponent"); *Estate Contractors Ass'n of E. Pa. v. City of Philadelphia*, 945 F.2d 1260, 1263 (3d Cir. 1991)("If information concerning the facts to be discovered is solely in the possession of the movant . . . 'a motion for continuance of a motion for summary judgment for purposes of discovery should . . . ordinarily be granted almost as a matter or course'").

Motions for a 56(f) continuance are "broadly favored and should be liberally granted." *Culwell v. City of Fort Worth*, 468 F.3d 868 (5th Cir. 2007)(holding District Court abused its discretion in denying plaintiff's motion for 56(f) continuance where plaintiff's discovery requests filed "more than two months before the end of discovery . . . ."); *see, e.g., Nidds v. Schindler Elevator Corp.*, 113 F.3d 912 (9th Cir. 1996)(indicating could be abuse of discretion to deny motion for 56(f) continuance where movant had discovery requests outstanding and cutoff date for discovery months away); *Visa Int'l Serv. Ass'n v. Bankcard Holders of America*, 784 F.2d 1472 (9th Cir. 1986)(holding District Court abused its discretion in denying motion for 56(f) continuance to conduct further discovery). At the summary judgment stage, the non-moving party's burden "rests on the assumption that the party 'had a full opportunity to conduct discovery'." *Doe v. Abington Friends School*, 480 F.3D at 257, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

Applying these principles, the District Court abused its discretion in denying DPP's Motion for Continuance. Notably, the District Court's ruling did not question the adequacy of the 56(f) Affidavit of Counsel in Support of Motion for Continuance, or DPP's need for additional discovery

to oppose Boise Mode's Motion for Summary Judgment. R., at 452. Instead, the only articulated basis for the District Court's denial of the Motion for Continuance was that DPP "did not provide sufficient reasoning as to why six months intervened between the receipt of initial discovery answers" which DPP alleged were unsatisfactory, and "any attempt too discover additional relevant information."[4] R., at 452.

Under the circumstances of this case, the Court's rationale is flawed. Undeniably, there was a sixth month delay between receipt of Boise Mode's discovery responses and the subpoenas to The North Face and Colliers Idaho Property Management, LLC. But service of the subpoenas pre-dated Boise Mode's November 24, 2010 Motion for Summary Judgment by nine (9) days. R., at 358, 360. Furthermore, The North Face failed to attend the December 1, 2010 deposition as scheduled, and Colliers Idaho Property Management, LLC informed DPP that it previously had turned over the requested files to Boise Mode and would not attend its December 1, 2010. R., at 365-366. Therefore, not only were discovery requests outstanding at the time of Boise Mode's Motion for Summary Judgment, but Boise Mode had sole possession of some the materials DPP was seeking. As such, the only way DPP could obtain the information it needed to support its case and oppose Boise Mode's Motion for Summary Judgment would be to file a Motion to Compel against Boise

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[4] Boise Mode served its Answers to Defendant/Counterclaimant's First Set of Interrogatories and Responses to Defendant/Counterclaimant's First Set of Requests for Production of Documents on May 10, 2010. Boise Mode served its subpoenas on The North Face and Colliers Idaho Property Management, LLC on November 15, 2010.

Mode and serve another subpoena on The North Face.[5] Meanwhile, DPP's opposition papers were due by December 8, 2010.

As the authority relied on above makes amply clear, properly supported motions for 56(f) continuance are ordinarily granted as a "matter of course." *Estate Contractors Ass'n of E. Pa. v. City of Philadelphia*, 945 F.2d at 1263. It is an abuse of its wide discretion when a court, as is the case here, denies a properly supported motion for summary judgment when there is an outstanding discovery request and the information sought is in the control of the opposing party. *See Doe v. Abington Friends School*, 480 F.3D at 257; *Ward v. United States*, 471 F.2d at 670; *Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d at 196-97; *Estate Contractors Ass'n of E. Pa. v. City of Philadelphia*, 945 F.2d at 1263; *see also XRT, Inc. v. Krellenstein*, 448 F.2d 772 (5th Cir. 1971)(holding summary judgment premature because district court did not require production of documents held by defendants). Furthermore, the deadline for initiating discovery was almost two months away when DPP served the subpoenas, as was the deadline for opposing motions for summary judgment. As such, considerations of prejudice and delay of proceedings were irrelevant. Nor was there anything in the record that intimates relevant information would not be discovered. *See, e.g., Zell v. Intercapital Income Securities, Inc.*, 675 F.2d 1041 (9th Cir. 1982)(reversing district court's summary judgment where nothing in record barred the possibility that relevant information

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[5] The North Face questioned whether the subpoena was served properly; however, it undeniably had notice of it, yet failed to attend or object to the subpoena at any time before the December 1, 2010 deposition date.

might be discovered). Therefore, granting a short continuance would have been of no moment, prejudiced no one, and would have laid to rest any doubts that DPP had not had "had a full opportunity to conduct discovery." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 257.

As analyzed herein, the facts of this case compel the conclusion that the District Court abused its considerable discretion in denying DPP's Motion for 56(f) Continuance. As such, DPP respectfully requests that this Court reverse the District Court's order denying DPP's Motion for 56(f) Continuance and granting summary judgment against DPP.

B. The District Court Erred In Considering and Ruling on Boise Mode's Motion for Reconsideration and Further Consideration of an Order Entered on a Motion Filed Under I.R.C.P. 59(e).

Plaintiff/Counter-Defendant's Motion for Reconsideration and Further Consideration requested review of the Court's March 2, 2011, Order granting DPP's Motion to Amend Judgment Pursuant to I.R.C.P. 59(e) ("Motion to Amend"), and reinstating some of DPP's causes of action. R., at 563. In the Motion to Amend, DPP urged the District Court to amend the Judgment it entered on January 5, 2011, because it was predicated on errors in law. R., at 482. Inexplicably, the Court deemed DPP's Motion to Amend to be a motion for reconsideration under I.R.C.P. 11(a)(2)(B) and a Motion to Amend the Judgment pursuant to I.R.C.P. 59(e), which is how it was captioned. R., at 518, 481.

DPP objected to Boise Mode's Motion for Reconsideration and Further Consideration because I.R.C.P 11(a)(2)(B) does not permit motions for reconsideration of orders entered on a

motion filed pursuant to I.R.C.P. 59(e). R., at 584-590, 639-641. The District Court rejected this argument, relying on *Elliot v. Darwin Neibaur Farms*, 138 Idaho 774, 785, 69 P.3d 1035, 1046 (2003), for the proposition that pursuant to I.R.C.P. 11(a)(2)(B), a court can reconsider and vacate any interlocutory order before the entry of final judgment. R., at 644.

The issue is one of interpretation of I.R.C.P. 11(a)(2)(B). The Idaho Supreme Court exercises free review over the interpretation of the Idaho Rules of Civil Procedure. *See Canyon County Bd. Of Equalization v. Amalgamated Sugar Co.*, 143 Idaho 58, 60, 137 P.3d 445, 447 (2006). The Court has applied rules of statutory construction to interpret the Idaho Rules of Civil Procedure. *See Obendorf v. Terra Hug Spray Company*, 145 Idaho 892, 900, 188 P.3d 834, 842 (2008); *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389, 396, 405 P.2d 634, 637-38 (1965). Interpretations generally should give meaning to each word, sentence and clause. *See Obendorf v. Terra Hug Spray Company*, 145 Idaho at 900, 188 P.3d at 842. The plain meaning of a statute, and, by analogy, a rule of civil procedure, will prevail unless controverted by the clearly expressed intent of the author or would lead to absurd results. *C.f., id.* ("The plain meaning of a statute will prevail unless clearly expressed legislative intent is contrary or unless plaining leads to absurd results.")

Here, the District Court erred in considering Boise Mode's Motion for Reconsideration and Further Consideration because the plain terms of I.R.C.P 11(a)(2)(B) proscribe motions of reconsideration of orders entered on motions filed under I.R.C.P. 59(e). I.R.C.P. 11(a)(2)(B) unequivocally proscribes motions for reconsideration of an order entered on a motion filed pursuant

to 59(e). It states in its entirety:

> (B) Motion For Reconsideration. A motion for reconsideration of any interlocutory orders of the District Court may be made at any time before the entry of final judgment but *not later* than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the District Court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; **provided, there shall be no motion for reconsideration of an order of the District Court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b).**

(Emphasis added).

Despite the District Court's characterization of the Motion to Amend as both a motion for reconsideration and Motion to Amend, it was filed pursuant to I.R.C.P. 59(e), and was captioned as such. R., at 481. The Court, in turn, granted it, and voided the Judgment, which had dismissed all of DPP's Counterclaims and granted summary judgment in favor of Boise Mode. R., at 524. Accordingly, the Motion to Amend should be treated as a motion to amend or alter a judgment under I.R.C.P. 59(e). *See Ross v. State*, 141 Idaho 670, 115 P.3d 761 (App. 2005)(holding motion to reconsider dismissal order "properly should be treated as a motion to alter or amend a judgment under I.R.C.P. 59(e)"). Moreover, this accords with the purpose of I.R.C.P. 59(e), which is to circumvent the need for an appeal by providing a District Court the opportunity to correct a legal or factual error in the proceedings. *See, e.g, Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977); *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (App. 1982).

Furthermore, the District Court's rationale explaining why it had the authority to hear Boise Mode's Motion for Reconsideration and Further Consideration is flawed. First, it renders

meaningless the last clause of I.R.C.P. 11(a)(2)(B). *See Obendorf v. Terra Hug Spray Company*, 145 Idaho at 900, 188 P.3d at 842. Second, the case upon which the District Court relied, *Elliot v. Darwin Neibaur Farms*, 138 Idaho 774, 785, 69 P.3d 1035, 1046 (2003) is distinguishable because that case did not involve a motion to reconsider an order entered on a motion filed pursuant to I.R.C.P. 59(e). *See id.*, 69 P.3d at 1046. Third, motions for reconsideration are filed to reconsider interlocutory orders, or orders made after the entry of final judgment. They are not the correct procedural vehicle to amend or alter a final judgment. *See* I.R.C.P. 11(a)(2)(B); *see also Idaho First Nat. Bank v. David Steed & Assocs.*, 121 Idaho 356, 825 P.2d 79 (1992)(holding inappropriate to consider motion for reconsideration as a I.R.C.P. 60(b) motion because no final judgment entered); *Marcher v. Butler*, 113 Idaho 867, 749 P.2d 486 (1988)(construing motion to consider new information discovered after the entry of final judgment to be I.R.C.P. 60(b) motion). The District Court erred in considering Boise Mode's Motion for Reconsideration and Further Consideration and, therefore, this Court should reverse the District Court's Order Granting Plaintiff's Motion for Reconsideration and Further Consideration.

C. The District Court Erred in Granting Summary Judgment to Boise Mode on DPP's Counterclaims.

In a two paragraph analysis and holding, the District Court dismissed DPP's counterclaims of (1) Constructive Eviction; (2) Breach of Contract; and (3) Breach of Covenant of Good Faith and Fair Dealing. R., at 646. The District Court supported its dismissal of DPP's counterclaims with three propositions. First, the District Court stated that the Lease unambiguously stated that "there

shall be no deduction, offset or abatement for any reason" unless otherwise allowed by the Lease. R., at 646. Second, the District Court noted that DPP had to be current on the Lease payments to "preserve their rights under" it. R., at 646. And third, the Court observed that the problems DPP complained about "ended well before the Defendants vacated the premises." *Id.* Based on that, the District Court dismissed DPP's Counterclaims.

This ruling is a profound abuse of discretion. Apparently, the District Court construed the language in the Lease barring deductions, offsets and abatements as a waiver by DPP of all claims that could arise out of the Lease.[6] But that is an absurd interpretation that essentially results in DPP being trapped in a Kafka-like tenancy despite the fact the record on summary judgment was replete with instances that when construed in favor of DPP, the non-moving party, indicated Boise Mode was breaching the express and/or implied terms of the Lease, as well as creating or allowing a situation that constituted constructive eviction.

As Boise Mode argued to the District Court, the affidavits that Boise Mode submitted in support of its motion for summary judgment raised ample questions of material fact. R., at 43-36. As explained above, DPP formally advised Boise Mode's property manager on August 15, 2008 "as to specific problems resulting from construction activities that make this situation untenable and

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[6] Set-off normally applies when both claims are liquidated. *See, e.g., Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 129 (Mo. 1985).

inhibit" its "ability to conduct business as a professional services office . . . ." R., at 303.[7] In a March 6, 2009, letter to Ms Aeschliman, Timothy Pace reiterated the litany of problems that DPP encountered at the Boise Mode building, which included debilitating construction noise and disruptions during business hours that required DPP employees to work outside the office, dangerous tools and materials left in hallways, an improperly installed ceiling fan that allowed water to leak into the premises, and an instance where a construction crew without authorization took over DPP's reception area. R., at 306. In a another letter from Mr. Pace to Ms. Aeschliman, dated May 20, 2009, DPP complained of disruptions in utility and elevator services to the already lengthy list. R., at 307.

The communications were not one-sided missives, but rather part of colloquy between DPP and Boise Mode in which the latter acknowledged problems with the tenancy. Notably, in a May 13, 2009, letter from Ms. Aeschliman to Timothy Pace, Boise Mode acknowledged that it was aware that "construction of the building had caused inconveniences." R., at 294. Additionally, Ms. Aeschliman admitted "there had been noise and disturbance" as a result of construction at the building, and issues related to "noise, the elevator, the hallways, and etcetera.". R., at 300, 295.

Construed most favorably to DPP, the non-moving party, the forgoing facts undeniably raise questions of fact of whether Boise Mode was breaching the covenant of good faith and fair dealing

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[7] Again, Ms. Aeschliman states in her affidavit at paragraph 8 that she believes Mr. Pace's letter should read "December 17, 2008."

implied in th Lease.[8] For example, exhibit E to the Office Lease, the terms and conditions of which were expressly incorporated into it, states in relevant part:

> Tenants, their agents, employees, or visitors, shall not make or commit any improper noises or disturbances of any kind in the building, or make or define the water closets . . . or interfere in any way with other Tenants or those having business with them.

R., at 59.[9] Based on this provision, DPP opposed Boise Mode's Motion for Summary Judgment by advancing a third party beneficiary analysis.

Section 10.1 of the Lease, in turn, obligated Boise Mode "to repair and maintain the roof and structural portions of the Facility including the basis plumbing, air conditioning, heating and electrical systems, exterior paint and trim" unless the tenant caused the damage. R., at 32. Section 19.3 sets forth the right to quiet enjoyment. *See* Exhibit A to Verified Complaint, at §19.3. R., at

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[8] The covenant of good faith requires the parties of a contract to perform, in good faith, the obligations contained in their agreement, and a violation occurs when either party violates, qualifies, or significantly impairs any benefit or right of the other party under the contract-whether express or implied. *Van v. Portneuf Medical Ctr.*, 47 Idaho 552, 562, 212 P.3d 982, 992 (2009).

[9] DPP subpoenaed the records of The North Face in part to obtain its lease with Boise Mode to verify that it incorporated an analogous provision. At all relevant times, DPP was denied access to a copy of that lease, but confirmed that it did only after the District Court granted summary judgment in favor of Boise Mode and dismissed DPP's counterclaims. At the hearing on Boise Mode's Motion for Reconsideration and Further Consideration, counsel for Boise Mode incorrectly told the Court that DPP had possession of the subpoenaed The North Face documents. *See* Transcript of May 23, 2011, hearing, at 38. The reality was DPP only received copies of those documents after the May 23, 2011, hearing. The further reality is that The North Face lease did incorporate language akin to that excerpted above from Exhibit E, see R., at 59, thereby supporting DPP's theory of the case. If and to the extent the District Court believed Boise Mode's statement that DPP possessed those documents, it could have erroneously thought they did not support its theory.

41. The ample facts set forth in the colloquy between DPP and Boise Mode, when viewed most favorably to DPP, indicate Boise Mode breached express terms of the Lease, impaired DPP's rights under it and constructively evicted its tenant. The District Court usurped the jury's role in granting summary judgment in favor of Boise Mode on DPP's counterclaims. *See Borah v. McCandless*, 147 Idaho 73, 79, 205 P.3d 1209, 1215 (2009)(stating whether breach of contract is material typically question of fact); *see also George v. Univ. of Idaho*, 121 Idaho 30, 37, 822 P.2d 549, 556 (Ct. App. 1991)(stating whether a party breached the implied covenant of good faith and fair dealing is a question of fact); *Steiner v. Ziegler-Tamura Ltd., Co.*, 138 Idaho 238, 242-43, 61 P.3d 595, 599-600 (2002)(breach of covenant of good faith is issue for jury that should survives summary judgment).

D. The District Erred in Granting Summary Judgment to Boise Mode on Its Causes of Action.

In its Order Granting Plaintiff's Motion for Reconsideration and Further Consideration, the District Court granted summary judgment in favor of Boise Mode on its claims of (1) Breach of Contract; (2) Breach of Covenant of Good Faith and Fair Dealing; and (3) Breach of Personal Guaranty (Timothy Pace). The District Court's rationale was the same analysis it set forth in support of dismissing DPP's counterclaims.

As with its dismissal of DPP's counterclaims, the District Court's grant of summary judgment on Boise Mode's causes of action is erroneous because material questions of fact existed as to whether Boise Mode's breaches excused DPP's non-payment of rent. If a party materially

breaches a contract, it excuses the other party's performance. *State of Idaho v. Chacon*, 146 Idaho 520, 524, 198 P.3d 749, 753 (Ct. App. 2008); *J. P. Stravens Planning Assoc., Inc. v. City of Wallace*, 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct. App. 1996)(see also authority cited therein). As discussed in Part III (C) above, Boise Mode breached the express and implied terms of the Lease. These breaches, or at least many of them, predated DPP's non-payment of rent. Boise Mode contended that DPP breached the Lease because it failed to pay rent in December 2008 and periodically thereafter. But as discussed above, the exhibits appended to the affidavit of Ms. Aeschliman that Boise Mode filed in support of its Motion for Summary Judgment, indicate that DPP put Boise Mode on notice of its breaches of the Lease in August 2008. R., at 276, 278, 303, 306, 307, 321, 324, 326, 327, 328, 294, 295, 300. As such, it is undisputed that Boise Mode was first in breach. For the same reasons, it is also undeniable that DPP was entitled to quiet enjoyment of the leased premises pursuant to Section 19.3 of the Lease.[10] The issue of whether Boise Mode's actions and breaches were material such that they excused DPP's non-performance is a question of fact for the jury. *See Borah v. McCandless*, 147 Idaho at 79, 205 P.3d at 1215. The District Court

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[10] Section 19.3 of the Office Lease states in full:
which states in full:

> QUIET ENJOYMENT. Landlord agrees that Tenant, upon paying the rent and other monetary sums due under this Lease and performing the covenants and conditions of this Lease and upon recognizing purchaser as Landlord, may quietly have, hold and enjoy the Premises during the term hereof; subject, however, to loss by casualty and all restrictions and covenants contained or referred to in this Lease.

committed reversible error by invading the province of the jury.

IV.

CONCLUSION

Summary Judgment should be granted cautiously, and only after the parties have had the opportunity to conduct full and fair discovery. By denying DPP's Motion for 56(f) Continuance, the District Court denied DPP of its opportunity to conduct full and fair discovery. In so doing, the District Court abused its discretion, and, as a result, the Judgment against DPP should be reversed. The District Court also committed reversible error when it entertained Boise Mode's Motion for Reconsideration and Further Consideration because it sought reconsideration of an order entered on a motion filed under I.R.C.P. 59(e). And finally, the District Court committed reversible error by granting summary judgment to Boise Mode on its causes of action and on DPP's counterclaims. Accordingly, Boise Mode respectfully urges the Court to reverse the District Court's August 26, 2011, Judgment, and remand this matter for further proceedings.

Respectfully Submitted this 16 day of February 2012.

MKelly

Michael E. Kelly
Attorney for the Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 16 day of February, 2012, two true and correct copies of the foregoing RESPONDENTS' BRIEF were served upon the following:

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